IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 12488 of 2000

For Approval and Signature:

HON'BLE MR.JUSTICE AKSHAY H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

K J DHULIA

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 12488 of 2000

MR IS SUPEHIA for Petitioner No. 1

MR PRADIP BHATE A.G.P. for Respondent No. 1

RULE SERVED BY DS for Respondent No. 1

RULE SERVED for Respondent No. 2

CORAM : HON'BLE MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 18/03/2004

ORAL JUDGEMENT

The unfortunate petitioner who has acquired

permanent disability on account of complete loss of his eye sight while in service has approached this Court making a grievance that his service has been wrongly terminated by the respondents by resorting to Rule 15 of Bombay Civil Service Rules [B.C.S.R.] on the ground that he has been declared medically unfit for performing duty and now he is being paid the invalidity pension only in accordance with Rule 38 of the CCS (Pension) Rules, 1972.

1.1. The petitioner joined the service of the respondents as a Medical Officer and he was appointed as such with effect from 30th June, 1983 in Class-II service of the State Government and was posted under the ESI scheme. Unfortunately, after rendering about 18 years' service, the nature played a cruel trick on him and the vision of both the eyes was permanently impaired. He was, therefore, unable to perform his routine duties as Medical Officer. It appears that he was asked to remain present before the Board of Referees, M & J Institute of Opthamology, in the Civil Hospital, Ahmedabad on 20th July, 1999 for examination. The Board opined that though he was unfit for routine duty, he could be considered for teaching Medicines as a blind teacher. In view of the aforesaid opinion, efforts were made by the respondents to find out suitable post for the petitioner in some educational institutions for teaching Medicines. However, according to them, no such post was available. Subsequently, the petitioner was served with a showcause notice dated 22nd July, 1999 on the ground that he had failed to remain present before the Medical Committee at Jamnagar as per the earlier intimation given to him and thereby, he had committed breach of Rule 6 (2) of Gujarat Civil Service (Conduct & Discipline) Rules, 1971. He was called upon to showcause why action for committing breach of the said Rules should not be taken against him. The petitioner appears to have filed his reply on 8th March, 2000. However, it further appears that he was ultimately examined by the Medical Board at Jamnagar. In the opinion of the Board, he was found to be incapable of performing his regular duties as Medical Officer. The Board had further opined that except for Opthalmic handicap, the petitioner was otherwise found physically fit. The said opinion is dated 12th December, 2001. The record of the petition shows that several attempts were made by this Court directing the respondents to find out suitable job for the petitioner. One of such directions has been given by the learned Single Judge (Coram : P.B. Majmudar, J.) vide order dated 11th April, 2001. Ofcourse, by the said order, the petitioner was also given option to make a representation without prejudice to his rights and contentions raised in this petition for

alternative employment. He was also given liberty to make a representation for grant of pension on the ground that he was incapacitated for further service. In the meanwhile, the respondents were also directed to file affidavit-in-reply.

1.2. Even after all these efforts, luck did not favour the petitioner and ultimately he was served with the order retiring him from service in accordance with provisions of the B.C.S.R. on the ground that he was permanently incapacitated to perform his duties. At present the petitioner is being paid invalidity pension. It is this decision which is being challenged in this petition by him.

1.3. The case of the respondents is that since the petitioner was not in a position to perform his routine duties on account of impaired vision, he could not be continued in service and he was required to retire from service in accordance with Rule 201 of the B.C.S.R. It is also their say that the petitioner himself had opted for retiral payment and invalidity pension and, therefore, now he cannot make such grievance.

2. Mr. I.S. Supehia, learned advocate appearing for the petitioner has submitted that the impugned decision of the respondents is absolutely erroneous and against the provisions of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 ("the Act" for short) and in particular Section 47 of it. He has further submitted that the impugned decision could be taken by the respondents only if the petitioner was found incapable of performing any duty, which is not the case here. He has also placed reliance on certain decisions which will be referred to in the due course of the judgment.

2.1. As against that Mr. Pradip Bhate learned A.G.P. has submitted that in the petition itself, the petitioner has stated that he is prepared to accept the invalidity pension and when that statement is made on oath, he cannot now turn around and insist for grant of relief prayed for in the petition.

3. To decide the issues arising in this petition, first it would be necessary to refer to certain definitions.

Clause 2 (b) defines "blindness".

"2(b). "blindness" refers to a condition where a person suffers from any of the following

conditions namely:-

(i) total absence of sight; or
(ii) visual acuity not exceeding 6/60 or 20/200 (snellen) in the better eye with correcting lenses; or
(iii) limitation of the field of vision subtending an angle of 20 degree or worse."

Clause 2 (i) defines "disability".

"2(i). "disability" means :-

(i) blindness;
(ii) low vision;
(iii) leprosy-cured;
(iv) hearing impairment;
(v) locomotor disability;
(vi) mental retardation;
(vii) mental illness."

Clause 2 (t) defines "person with disability".

"2(t). "Person with disability" means a person suffering from not less than forty percent of any disability as certified by a medical authority."

Clause 2 (u) defines "person with low vision".

2(u). "Person with low vision" means a person with impairment of visual functioning even after treatment or standard refractive correction but who uses or is potentially capable of using vision for the planning or execution of a task with appropriate assistive device."

3.1. In view of the aforesaid definitions and also in view of the opinions expressed by the Board of Referees at Ahmedabad and Medical Officer at Jamnagar, it clearly appears that the petitioner can be treated as "person with disability". It is also clear that he is not in a position to perform his duties as Medical Officer. There is no dispute on that count raised even by the petitioner. However, the question for consideration is whether such disability would require the respondents to retire him before he reached the age of superannuation and to pay to him the invalidity pension. The answer would be "No". There are several reasons for this answer.

3.2. First of all, provisions of Section 47 of the Act are required to be seen and they are as under :-

"Section 47(1): No establishment shall dispense with, or reduce in rank, an employee who acquires a disability during his service.

Provided that, if an employee, after acquiring disability is not suitable for the post he was holding, could be shifted to some other post with the same payscale and service benefits;

Provided further that if it is not possible to adjust the employee against any post, he may be kept on a supernumerary post until a suitable post is available or he attains the age of superannuation, whichever is earlier.

(2). No promotion shall be denied to a person merely on the ground of his disability;

Provided that the appropriate Government may, having regard to the type of work carried on in any establishment, by notification and subject to such conditions, if any, as may be specified in such notification, exempt any establishment from the provision of this section."

3.3. A plain reading of the aforesaid provision makes it very clear that a person with disability is not to be thrown out of the employment, only because, the nature has become unkind to him. In case of the petitioner, he joined the service as Medical Officer, when there was no such disability suffered by him. It was only after the service of 18 years he starting losing his vision which ultimately, resulted into complete blindness and thereafter he was not able to perform his duties as Medical Officer. However, upon medical examination by the Board of Referees as well as Medical Board at Jamnagar, it was never found that he was incapable to do any other job. On the contrary, they had opined positively in favour of the petitioner. Thus, the respondents were required to find out and make available to the petitioner a suitable alternative post having the same payscale. The provisions of Section 47 even prescribe creation of supernumerary post if alternative

post is not available. Obviously, therefore, the petitioner was entitled to have full protection under Section 47. When that was the say, the respondents were under the statutory obligation to find out alternative suitable post for him having equal payscale. The affidavit-in-reply filed by the respondent and the other material on the record of the petition, show that they have tried to find out suitable alternative post for him including the post in the Medical College but since, he was not acquainted with the Braille i.e. language for the blind, it was not possible to give him a job in the teaching institutions also. Mr. Supehia has drawn my attention to the decision of the Apex Court rendered in the case of Kunal Singh v. Union of India reported in 2003 A.I.R. S.C.W. p.1013. In the said decision it has been held as under :-

"9. Chapter VI of the Act deals with employment relating to persons with disabilities, who are yet to secure employment. Section 47, which falls in Chapter VIII, deals with an employee, who is already in service and acquires a disability during his service. It must be borne in mind that Section 2 of the Act has given distinct and different definitions of "disability" and "person with disability". It is well settled that in the same enactment if two distinct definitions are given defining a word/ expression, they must be understood accordingly in terms of the definition. It must be remembered that person does not acquire or suffer disability by choice. An employee, who acquires disability during his service, is sought to be protected under Section 47 of the Act specifically. Such employee, acquiring disability, if not protected would not only suffer himself but possibly all those who depend on him would also suffer. The very frame and contents of Section 47 clearly indicate its mandatory nature. The very opening part of Section reads "no establishment shall dispense with, or reduce in rank, an employee who acquires a disability during his service". The Section further provides that if an employee after acquiring disability is not suitable for the post he was holding, could be shifted to some other post with the same payscale and service benefits; if it is not possible to adjust the employee against any post he will be kept on a supernumerary post until a suitable post is available or he attains the age of

superannuation, whichever is earlier. Added to this no promotion shall be denied to a person merely on the ground of this disability as is evident from sub-section (2) of Section 47. Section 47 contains a clear directive that the employer shall not dispense with or reduce in rank an employee who acquires a disability during the service. In construing a provision of social beneficial enactment that too dealing with disabled persons intended to give them equal opportunities, protection of rights and full participation, the view that advances the object of the Act and serves its purpose must be preferred to the one which obstructs the object and paralyses the purpose of the Act. Language of Section 47 is plain and certain casting statutory obligation on the employer to protect an employee acquiring disability during service."

In the case before the Apex Court, the appellant was being paid invalidity pension in accordance with Rule 38 of CCS (Pension) Rules, 1972. The Apex Court held that on account of payment of invalidity pension, the concerned employee would not lose protection under Section 47. It has held as under :-

"12. Merely because under Rule 38 of CCS (Pension) Rules, 1972, the appellant got invalidity pension is no ground to deny the protection, mandatorily made available to the appellant under Section 47 of the Act. Once it is held that the appellant has acquired disability during his service and if found not suitable for the post he was holding, he could be shifted to some other post with same pay scale and service benefits, if it was not possible to adjust him against any post, he could be kept on a supernumerary post until a suitable post was available or he attains the age of superannuation, whichever is earlier. It appears no such efforts were made by the respondents. They have proceeded to hold that he was permanently incapacitated to continue in service without considering the effect of other provision of Section 47 of the Act."

3.4. The Apex Court has gone to the extent of directing the concerned authorities to create a supernumerary post for the appellant, if no suitable post was found for him. Mr. Supehia has also placed reliance on the decision of the Delhi High Court rendered in the

case of Delhi Transport Corporation v. Rajbir Singh reported in 100 (2002) Delhi Law Times 111 (DB). In the said judgment also it has been held that by virtue of Section 47 of the Act, a legal right has been conferred upon disabled employees to pray for and obtain a writ of mandamus.

3.5. The Delhi High Court has relied on its earlier decision and it has spelt out that intention of Section 47 is to give adequate protection to disabled employee and to see that he is not rendered jobless and not deprived of his livelihood. Mr. Supehia has also placed reliance on the decision of this Court (Coram : H.K. Rathod, J.) in the case of Gujarat State Road Transport Corporation v. Gopal M. Patel reported in 2003 (2) G.L.R. 428, wherein the award passed by the Labour Court quashing and setting aside the order of termination of service of the concerned employee on the ground of disability, was confirmed by this Court.

3.6. It may be noted here that petitioner has been retired from the service by the respondents in accordance with Rule of B.C.S.R. It is on record that except for the Medical duties the petitioner was in a position to perform other functions and he was capable of rendering service, if any other suitable job was offered to him. These rules will apply only when the concerned person is not all in a physically or mentally fit condition to render any type of service, Government cannot retire such person and pay him invalidity pension merely because he is not able to perform his routine duty and there is no other suitable job available which can be offered to him.

3.9. Further respondents have relied on the provisions of B.C.S.R. to retire the petitioner, whereas petitioner heavily relies on the provisions of Section 47 of the Act. Thus, against the Rules there is substantive provisions of a specially enacted statute. Obviously, therefore, the Rules will have to make way for the substantive provision.

4. It may be noted here that the petitioner has been retired from the service by the respondents in accordance with provisions of the B.C.S.R. It is on record that except for the medical duties the petitioner was in a position to perform other functions and he was capable of rendering service, if any other suitable job was offered to him. If these rules will apply only when the concerned person is not at all in a physically or mentally fit condition to render any type of service, the Government to render any type of service, the Government

cannot retire such person and pay him invalidity pension merely because he is not able to perform his routine duty and there is no other suitable job available which can be offered to him.

4.1. Further the respondents have relied on the provisions of B.C.S.R. to retire the petitioner whereas, the petitioner heavily relies on the provisions of Section 47 of the Act. Thus, against the Rules there is substantive provision of a specially enacted statute. Obviously therefore, the Rules will have to make way for the substantive provision.

5. Thus, the law on this aspect is very clear. When the respondents failed to find suitable job as per their say, it was incumbent upon them to create supernumerary post for the petitioner and accommodate him on that post till he reached the age of superannuation. Merely because at some point of time, he had shown willingness to accept the invalidity pension, it does not mean that it should bind him for all time to come. It is stated by Mr. Supehia at the bar that it was only meant by way of interregnum arrangement till the suitable post was found for the petitioner. However, when he was told that if he accepted the invalidity pension, he would not be given any job and, therefore, he has now insisted for grant of relief prayed for in this petition. No fault can be found with him when such is the situation. A desperate person would try to get benefit of whatever that is made available to him. It, would never, mean that he has given up his legitimate right to prosecute the proceedings under Article 226 of the Constitution of India. The contention of the respondents, therefore, cannot be accepted.

In view of the aforesaid, this petition is allowed. The Resolution dated 20th October, 2000 and the consequential order dated 25th October, 2000, terminating the service are hereby quashed and set-aside. The respondents are directed to find out a suitable alternative post for the petitioner and if they failed to do so, they should create supernumerary post for him and to appoint him on the said post till he reaches the age of superannuation. In other words, the respondents are directed to reinstate him in the service together with all the consequential benefits that may become payable by virtue of this order. Rule is made absolute with no order as to costs.

[AKSHAY H. MEHTA, J.]

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